SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-485

THE PEOPLE OF THE STATE OF MICHIGAN, *Petitioner*,

v

MARVIN DAVIS, *Respondent*.

Michigan Supreme Court No. 56152

THE PEOPLE OF THE STATE OF MICHIGAN, *Petitioner*,

v

WILLIE WELLS, *Respondent*.

Michigan Supreme Court No. 56153

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Michigan Supreme Court No. 56153

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

The Prosecuting Attorney for the County of Kent, State of Michigan, prays that a writ of certiorari issue to review the judgments of the Supreme Court of the State of Michigan entered in the above cases on August 9, 1974.

OPINIONS BELOW

In Michigan Supreme Court No. 56152 (*People* v *Marvin Davis*), the opinion of the Court of Appeals of the State of Michigan, Division 3, is reported at 53 Mich App 94; 218 NW2d 787 (May 1, 1974). In Michigan Supreme Court

No. 56153 (*People* v *Willie Wells*), the Court of Appeals of the State of Michigan, Division 3, issued an unreported Memorandum Opinion under Docket Nos. 17071-17074 (May 21, 1974). The orders of the Supreme Court of the State of Michigan which are the subject of this petition were issued August 9, 1974 in both cases and are not reported.

Copies of both Court of Appeals opinions and both Supreme Court orders are attached hereto as Appendices A through D, respectively.

JURISDICTION

The judgments of the Supreme Court of the State of Michigan were made and entered in the form of orders of said Court on August 9, 1974, and copies thereof are appended to this petition as Appendix C and Appendix D. The jurisdiction of this Court is invoked under 28 USC 1257(3). The case believed to sustain jurisdiction is *Ross* v *Moffitt*, ... US .....; 94 S Ct 2437; 41 L Ed 2d 341 (1974).

QUESTION PRESENTED

Respondents were convicted of different state criminal offenses in separate jury trials in the Circuit Court for the County of Kent, State of Michigan. Claiming indigency, both respondents made timely requests for the appointment of counsel for appeal of right to the Court of Appeals of Michigan, the intermediate state appellate court. Separate counsel were appointed to represent respondents, and in separate proceedings before the Michigan Court of Appeals both convictions were affirmed. Both respondents thereupon petitioned the Supreme Court of Michigan for appointment of counsel to represent them on a subsequent application for discretionary appeal to that Court. In separate orders made and entered on August 9, 1974, the Supreme Court of Michigan, acting solely "pursuant to *Mitchell* v *Johnson*, 488 F2d 349 (CA 6, 1973)", appointed counsel "for the preparation and filing with this

Court of an application for leave to appeal on behalf of" each respondent. The question presented is:

Whether, consistent with *Ross* v *Moffitt*, ... US .....; 94 S Ct 2437, 41 L Ed 2d 341 (1974), the Supreme Court of Michigan can order the appointment of counsel at public expense for an indigent criminal defendant, who has already had appointed counsel for an unsuccessful appeal of right to the intermediate state appellate court, for a subsequent application for leave to appeal to the state supreme court, based solely on the federal constitutional grounds set forth in *Mitchell* v *Johnson*, 488 F2d 349 (CA 6, 1973).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The federal constitutional provisions involved in this petition are US Constitution, Amendment XIV, the text of which is attached hereto as part of Appendix E. Also attached in Appendix E are the Michigan constitutional, statutory and court rule provisions delineating the appellate jurisdiction of and relationship between the Court of Appeals of Michigan and the Supreme Court of Michigan. These latter provisions include Michigan Constitution of 1963, Art 6, §§1, 4, 5 and 10; Michigan General Court Rules of 1963, 801.1, 803.1, 806.1, 851 and 853.1; and Michigan statutes MCLA 600.212; MSA 27A.212, MCLA 600.215; MSA 27A.215, MCLA 600.308; MSA 27A.308 and MCLA 600.309; MSA 27A.309.

STATEMENT

In Michigan Supreme Court No. 56152, respondent Marvin Davis was arrested on May 23, 1972 and arraigned in the District Court for the 61st Judicial District of Michigan on a charge of sale of heroin in violation of MCLA 335.152; MSA 18.1122, presently MCLA 335.341(1)(a); MSA 18.1070(41)(1)(a). Retained counsel filed an ap-

pearance on behalf of respondent Davis on May 30, 1972. Preliminary examination was held in the 61st District Court on June 1, 1972, and respondent Davis was bound over to the Circuit Court for the County of Kent. An information was filed in Circuit Court by the Prosecuting Attorney and a plea of not guilty thereto was entered on behalf of respondent Davis at an arraignment conducted June 9, 1972.

Trial by jury was commenced in Circuit Court on August 9, 1972 and concluded with a verdict of guilty as charged on August 11, 1972. On October 10, 1972, respondent Davis was sentenced to a prison term of not less than 3½ nor more than 20 years. Claiming indigency, he timely petitioned for appointment of counsel for an appeal of right to the Court of Appeals of Michigan. This petition was granted, counsel was appointed and the appeal was duly filed and heard. On May 1, 1974, a panel of the Court of Appeals, Division 3, affirmed respondent's conviction and sentence. *People* v *Davis*, 53 Mich App 94; 218 NW2d 787 (1974). Respondent Davis thereafter filed papers with the Supreme Court of Michigan which were construed by that Court as a request for appointment of counsel for application for discretionary appeal to that Court. By order dated August 9, 1974, the Michigan Supreme Court acting *solely* "pursuant to *Mitchell* v *Johnson*, 488 F 2d 349 (CA 6, 1973)", appointed the State Appellate Defender to represent respondent Davis in the preparation and filing of an application for discretionary appeal.

In Michigan Supreme Court No. 56153, respondent Willie Weils was arrested on July 26, 1972 and arraigned in the District Court for the 61st Judicial District of Michigan and arraigned on six counts of receiving and concealing stolen property valued at more than $100.00 in violation of MCLA 750.535; MSA 28.803. Retained counsel filed an appearance on behalf of respondent and at a preliminary examination held August 8, 1972 in the 61st District Court, respondent was bound over to the Circuit Court for the County of Kent on five of the counts. Five separate informations were filed by the Prosecuting Attorney, and pleas of not guilty were entered to each on behalf of re-

spondent Wells at his August 18, 1972 Circuit Court arraignment.

All five informations were consolidated for Circuit Court jury trial which began January 22, 1973. On January 23, 1973, one of the informations was dismissed on motion of the prosecutor on grounds of insufficient evidence and on January 24, 1973, respondent was found guilty as charged in the other four informations. He was sentenced on March 26, 1973 to a prison term of not less than 3 nor more than 5 years on each count and, claiming indigency, he requested court-appointed counsel for appeal of right to the Michigan Court of Appeals. Counsel was appointed, the appeal was processed and on May 21, 1974, a panel of the Court of Appeals, Division 3, affirmed respondent's conviction and sentence in an unreported Memorandum Opinion. Respondent Wells thereafter filed papers with the Supreme Court of Michigan, which Court construed these papers as a request for appointment of counsel for application for discretionary appeal to that Court. By order dated August 9, 1974, the Michigan Supreme Court, acting *solely* "pursuant to *Mitchell* v *Johnson*, 488 F2d 349 (CA 6, 1973)", appointed the State Appellate Defender to represent respondent Wells in the preparation and filing of an application for discretionary appeal.

The August 9, 1974 orders of the Michigan Supreme Court, entered separately as to respondents Marvin Davis and Willie Wells, are the subject of the present petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The August 9, 1974 orders of the Supreme Court of Michigan here in question should be reviewed because they are in direct and unreconcilable conflict with the decision of this Court in *Ross* v *Moffitt*, ... US .....; 94 S Ct 2437; 41 L Ed 2d 341 (1974). This conflict is readily apparent from the very language of the orders, which reveals that they were not based upon any independent state constitutional or statutory provisions, but were issued *solely* "pur-

suant to *Mitchell* v *Johnson*, 488 F2d 349 (CA 6, 1973)." *Mitchell* v *Johnson*, *Supra*, is, in turn, a *federal* decision based upon an interpretation of the *United States* Constitution which was specifically found to be erroneous by this Court in the subsequently decided case of *Ross* v *Moffitt*, *Supra*.

Mitchell v *Johnson*, *Supra*, involved an appeal from denial of federal habeas corpus relief in the United States District Court for the Eastern District of Michigan. Petitioner-appellant Mitchell was convicted of unarmed robbery in a Michigan state trial court and his conviction was affirmed on appeal of right to the Michigan Court of Appeals. Being indigent, he was represented by appointed counsel both at trial and on appeal. However, his request for appointed counsel to represent him on application for discretionary appeal to the Supreme Court of Michigan was denied, as was his subsequently filed *pro se* application for discretionary appeal. On habeas corpus, he claimed, *inter alia*, that denial of appointed counsel to aid him on the application for discretionary review violated his Fourteenth Amendment equal protection and due process rights. The United States Court of Appeals for the Sixth Circuit, 488 F2d 349, stated the issue on appeal as follows:

> "This appeal requires us to decide whether a state may, agreeably to the Constitution, refuse to appoint counsel to assist an indigent defendant in the preparation of an application for discretionary direct appeal to the state supreme court when nonindigent defendants customarily employ counsel for this purpose. We hold that it may not."

Basing its decision principally upon the holding of this Court in *Douglas* v *California*, 372 US 353; 83 S Ct 814; 9 L Ed 2d 811 (1963), the Sixth Circuit, 488 F2d at 351, reasoned:

> "The disadvantage to the indigent in this case is no less substantial [than in *Douglas*]. The assistance of a skilled advocate who understands the intricate and subtle factors that might persuade a court to exercise its discretionary review and who possesses the power

to communicate them succinctly and cogently appears to be as important here as is the assistance of counsel at trial or on a first appeal. Defendants without education in the law or experience in its practice cannot be expected, unaided, to state accurately and clearly whatever claims for justice their cases might possess. Although empirical data is lacking, we think it not unreasonable to postulate that discretionary review will be denied indigents in a significant number of cases where wealthier appellants, with the assistance of counsel, would have obtained review and possibly a reversal of the conviction on the merits. And, of course, when the prosecution seeks discretionary review, as is premitted in appropriate circumstances, the state's application is always the product of legal counsel. Where liberty is at stake, we consider the substantial disadvantage experienced by the unassisted indigent to be an invidious discrimination and a denial of fundamental fairness required by the equal protection and the due process clauses of the Fourteenth Amendment. In reaching this conclusion, we do no more than adhere to principles firmly established in our law. [Citation to *Douglas* and other cases omitted]."

Inasmuch as *Mitchell* v *Johnson, Supra*, was the only authority cited by the Michigan Supreme Court in its August 9, 1974 orders in the instant cases, it must be presumed that these orders were issued by that Court *solely* on the basis of the above quoted interpretation of the Fourteenth Amendment. Apparently unnoticed by the Michigan Supreme Court, however, was this Court's decision in *Ross* v *Moffitt, Supra*, which post-dated *Mitchell* and clearly repudiated the *Mitchell* interpretation of the Fourteenth Amendment. In *Ross* v *Moffitt, Supra*, where the operative facts are indistinguishable from those in *Mitchell*, this Court, ... US at .....; 94 S Ct at 2440; 41 L Ed 2d at 346, stated:

"We are asked in this case to decide whether *Douglas* v *California*, 372 US 353; 83 S Ct 814; 9 L Ed 2d 811 (1963), which requires appointment of counsel for

indigent states defendants on their first appeal as of right, should be extended to require counsel for discretionary state appeals and for applications for review in this Court. The Court of Appeals for the Fourth Circuit held that such appointment was required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment [citing *Moffitt* v *Ross*, 483 F2d 650 (CA 4, 1973)]*"

In expressly reversing this holding by the Fourth Circuit in *Moffitt* and thus *sub silento* overruling the holding of the Sixth Circuit in *Mitchell*, this Court, ... US at .....; 94 S Ct at 2443-2444; 41 L Ed 2d at 351, concluded as follows with respect to the Due Process Clause:

"We do not believe that the Due Process Clause requires North Carolina to provide respondent with counsel on his discretionary appeal to the State Supreme Court. At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel at his trial is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the

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* This decision by the Fourth Circuit in *Moffitt* v *Ross*, *Supra*, was cited and apparently followed by the Sixth Circuit in *Mitchell* v *Johnson*, *Supra*, 488 F2d at 350. In *Mitchell*, the Sixth Circuit arrived at the same conclusion under the Fourteenth Amendment as did the Fourth Circuit in *Moffitt*.

court or jury seeking to persuade them of the defendant's guilt. Under these circumstances ". . . reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon* v. *Wainwright*, 372 U.S., at 344, 83 S. Ct., at 796.

By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane* v. *Durston*, *supra*. [153 US 684; 14 S Ct 913; 38 L Ed 2d 867 (1894)]

The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. *Douglas* v. *California*, *supra*. Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty. That question is more profitably considered under an equal protection analysis."

Similarly, with respect to the Equal Protection Clause, this Court, ... US at .....; 94 S Ct at 2444-2445, 2446-2447; 41 L Ed 2d at 352, 354, held:

"Despite the tendency of all rights "to declare themselves absolute to their logical extreme," there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence

to principles recognized in other decisions of this Court. The Fourteenth Amendment "does not require absolute equality or precisely equal advantages," *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 24, 93 S. Ct. 1278, 1291, 36 L. Ed. 2d 16 (1973), nor does it require the State to "equalize economic conditions." *Griffin* v. *Illinois*, *supra*, 351 U.S. at 23, 76 S. Ct. at 592 (Frankfurter, J., concurring). It does require that the state appellate system be "free of unreasoned distinctions," *Rinaldi* v. *Yaeger*, 384 U.S. 305, 310, 86 S. Ct. 1497, 1500, 16 L. Ed. 2d 577 (1966), and that indigents have an adequate opportunity to present their claims fairly within the adversarial system. *Griffin* v. *Illinois*, *supra*; *Draper* v. *Washington*, *supra*. The State cannot adopt procedures which leave an indigent defendant "entirely cut off from any appeal at all," by virtue of his indigency, *Lane* v. *Brown*, *supra*, 372 U.S. at 481, 83 S. Ct. at 771, or extend to such indigent defendants merely a "meaningless ritual" while others in better economic circumstances have a "meaningful appeal." *Douglas* v. *California*, *supra*, 372 U.S. at 358, 83 S. Ct. at 817. The question is not one of absolutes, but one of degrees. In this case we do not believe that the Equal Protection Clause, when interpreted in the context of these cases, requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court.

* * *

This is not to say, of course, that a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would not prove helpful to any litigant able to employ him. An indigent defendant seeking review in the Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. But both the opportunity to have counsel prepare an initial brief in the

> Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*. And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. We think respondent was given that opportunity under the existing North Carolina system."

The Court noted that it was "fortified in this conclusion" by its understanding of the function served by discretionary review in the North Carolina Supreme Court, where the critical issue is whether "the subject matter of the appeal has significant public interest", whether "the cause involves legal principles of major significance to the jurisprudence of the state," or whether the decision below is in probable conflict with a decision of the Supreme Court. ..... US at .....; 94 S Ct at 2446; 41 L Ed 2d at 353-354. As thus described, the discretionary reviewing function of the North Carolina Supreme Court is virtually identical to that of the Michigan Supreme Court. See Michigan General Court Rule 853.1 (officially cited as GCR 1963, 853.1), which is attached hereto as part of Appendix E.

This Court also noted that, after having had an appeal of right presented on his behalf by appointed counsel before an intermediate state appellate court, an indigent "will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many instances an opinion by the Court of Appeals disposing of his case". These materials, together with anything the indigent may wish to file *pro se*, this Court concluded, "would appear to provide the Supreme Court of North

Carolina with an adequate basis on which to base its decision to grant or deny review." ..... US at .....; 94 S Ct at 2446; 41 L Ed 2d at 353.

Respondents Marvin Davis and Willie Wells in the instant case likewise have available to them transcripts of their trials, briefs prepared on their behalf by appointed counsel in the Court of Appeals, and opinions of the Court of Appeals disposing of their cases. Accordingly, inasmuch as the discretionary reviewing functions of the North Carolina and Michigan Supreme Courts are essentially the same, this material should provide the Michigan Supreme Court "with an adequate basis on which to base its decisions to grant or deny review" without having to appoint counsel for respondents to assist them in filing applications for discretionary review.

It appears that the Michigan Supreme Court was correct in concluding that the facts in the instant cases are directly in point with those in *Mitchell* v *Johnson, Supra.* However, the facts of these cases are also directly in point with those in *Ross* v *Moffitt, Supra,* and the Michigan Supreme Court was clearly in error when it followed *Mitchell* after *Ross* was decided. This error is of federal Constitutional dimensions and can only be rectified by action of this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: October 7, 1974.

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APPENDIX A

May 1, 1974 Opinion of the Court of Appeals of Michigan, Division 3, in *People* v *Marvin Davis*, 53 Mich App 94; 218 NW2d 787 (1974).

PEOPLE v DAVIS

OPINION OF THE COURT

1. CRIMINAL LAW — TESTIMONY — POLYGRAPHS — INSTRUCTIONS TO JURY.

   Reference to a polygraph examination, made by a defendant as a non-responsive answer to a question posed by the prosecutor, did not constitute reversible error where the court immediately thereafter instructed the jury to disregard any mention of the polygraph and in its final instructions specifically instructed the jury to disregard any and all references made to the term "polygraph" or "polygraph administration".

2. CRIMINAL LAW—INSTRUCTIONS TO JURY—POLYGRAPHS.

   A trial court's failure to include a reference to the unreliability of polygraph tests in its instructions to the jury to disregard a reference to a polygraph examination was not reversible error where no request was made for such an instruction.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 7] 29 Am Jur 2d, Evidence § 831.
Physiological or psychological truth and deception tests, 23 ALR2d 1308.
[3] 25 Am Jur 2d, Drugs, Narcotics, and Poisons, § 38.
[4] 5 Am Jur 2d, Appeal and Error §§ 783, 817.
[5] 47 Am Jur 2d, Jury §§ 139, 141.
[6] 21 Am Jur 2d, Criminal Law §§ 533, 572.

3. Drugs and Narcotics—Heroin—Procuring Agent—Defense—Criminal Law.

A defendant charged with delivery of heroin cannot use the defense that he was only a procuring agent and therefore could not be found guilty as a seller of narcotics where he testified that the police officer did not give him any money and that defendant did not give the officer any drugs and that the transaction was not consummated; one may not assert the defense when the offense is denied.

4. Appeal and Error—Instructions to Jury—Miscarriage of Justice.

Appellate review of allegedly erroneous jury instructions is precluded absent a showing of miscarriage of justice where defense counsel expressed his satisfaction with the instructions; there was no showing of a miscarriage of justice where, upon examination of the instructions as a whole the Court of Appeals has determined that the defendant was not prejudiced by the instructions.

5. Juries—Jury Panels—Voter Lists—Discrimination.

The use of voter registration lists for the selection of jury panels does not, on its face, deny a defendant a jury composed of a valid cross section of the community, and no error is found where a defendant has not presented any evidence of discrimination.

6. Criminal Law—Sentencing—Statutes.

A defendant cannot complain about a former mandatory 20-year sentence provision of a statute where he has received the benefit of the sentencing provisions of a new statute (MCLA 335.112; 335.341[1][a]).

Concurrence by O'Hara, J.

7. Criminal Law — Testimony — Polygraph — Instructions to Jury.

A criminal defendant is not entitled to a blanket instruction that the jury should disregard references to polygraph tests because of their unreliability.

Appeal from Kent, George V. Boucher, J. Submitted Division 3 February 8, 1974, at Grand Rapids. (Docket No. 16577.) Decided May 1, 1974.

Marvin Davis was convicted of delivery of heroin. Defendant appeals. Affirmed.

Frank J. Kelly, Attorney General, *Robert A. Derengoski*, Solicitor General, *James K. Miller*, Prosecuting Attorney, *Donald A. Johnston, III*, Chief Appellate Attorney, and *David A. Dodge*, Assistant Prosecuting Attorney, for the people.

Roach, Twohey, Benson & Brady, for defendant.

Before: R. B. Burns, P.J., and Allen and O'Hara,* JJ.

Allen, J. Defendant was convicted of delivery of heroin, contrary to MCLA 335.152; MSA 18.1122, currently MCLA 335.341(1)(a); MSA 18.1070(41)(1)(a). He received a sentence of 3½ to 20 years in prison, and has raised 6 issues on appeal.

We find no merit in defendant's argument that reversible error was committed at trial when reference was made to defendant's taking a polygraph examination and when the trial court denied defendant's subsequent motion for a mistrial. The reference to the polygraph examination was made by defendant as a nonresponsive answer to a question posed by the prosecutor. The trial court, immediately after defendant's answer was given, instructed the jury to disregard any mention of the polygraph and in its final instructions specifically instructed the jury to disregard "any and all references made to the term 'polygraph' or

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* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

'polygraph administration' ". No grounds for mistrial were present, and we find no reversible error. *People* v *Tyrer,* 19 Mich App 48, 51; 172 NW2d 53 (1969), *appeal dismissed,* 385 Mich 484 (1971); *People* v *Paffhousen,* 20 Mich App 346, 351; 174 NW2d 69 (1969), *leave to appeal denied,* 383 Mich 825 (1970). Defense counsel contends that the jury instruction was insufficient since it should have included reference to the unreliability of polygraph tests. A proper jury instruction should include admonition to disregard a reference to a polygraph test because of its unreliability, but absent a request for such an instruction, the trial court's failure to so instruct is not reversible error. *People* v *Baker.* 7 Mich App 471, 476; 152 NW2d 43 (1967), *leave to appeal denied,* 380 Mich 766 (1968), *cert den,* 393 US 953; 89 S Ct 382; 21 L Ed 2d 365 (1968).

Defendant argues that he was a procuring agent and therefore could not be found guilty as a seller of narcotics. While *People* v *Boone,* 31 Mich App 193, 195; 187 NW2d 569 (1971), rejected this defense, *People* v *Turner,* 38 Mich App 479, 487; 196 NW2d 799 (1972), *reversed on other grounds,* 390 Mich 7; 210 NW2d 336 (1973), recognized the validity of the "procuring agent" defense. One may not assert the defense of entrapment when the offense is denied. *People* v *Hogan,* 48 Mich App 242, 246; 210 NW2d 376 (1973). See, also, *People* v *Bersine,* 48 Mich App 295, 299; 210 NW2d 501 (1973), and cases cited therein. Defendant testified that the police officer did not give him any money and that defendant did not give the officer any drugs. Defendant testified that after a short discussion as to a possible narcotics transaction, said transaction was not consummated. Therefore, the procuring agent defense was not available to defendant.

Defendant argues that the trial court's instructions to the jury were confusing, that the elements of the offense were not properly defined, and that the trial court erroneously implied that defendant could be guilty of aiding and abetting the offense at issue despite the fact that the court had recognized the procuring agent defense. However, defense counsel expressed his satisfaction with the jury instructions. Absent a showing of a miscarriage of jus-

tice, appellate review of allegedly erroneous jury instructions is precluded. GCR 1963 516.2. *People* v *George Jones*, 48 Mich App 102, 104-105; 210 NW2d 145 (1973). Examining the jury instructions as a whole, rather than in excerpts, this Court has determined that defendant was not prejudiced by the court's instructions. *People* v *Peace*, 48 Mich App 79, 85; 210 NW2d 116 (1973).

Relying upon *People* v *Hernandez*, 15 Mich App 141; 170 NW2d 851 (1968), defendant argues that the 120-day delay between the date of the offense and defendant's arrest unduly prejudiced his ability to prepare an adequate defense. The record discloses that the delay was not purposeful, nor was defendant prejudiced thereby. *People* v *Johnson*, 41 Mich App 34, 41-44; 199 NW2d 561 (1972).

Defendant argues that MCLA 600.1306(1)(a); MSA 27A.1306(1)(a), which provides for the use of voter registration lists for the selection of jury panels, is illogical and does not serve any useful purpose. Defendant has not presented this Court with any evidence of discrimination, and the use of voter registration lists does not, on its face, deny a defendant "* * * a jury composed of a valid cross section of the community". *People* v *Stockard*, 48 Mich App 680, 685; 211 NW2d 62 (1973).

Contrary to defendant's argument, *People* v *Lorentzen*, 387 Mich 167; 194 NW2d 827 (1972), did not render MCLA 335.152; MSA 18.1122 unconstitutional. *People* v *Bersine*, 48 Mich App 295, 303; 210 NW2d 501 (1973). Relying upon MCLA 335.361(1); MSA 18.1070(61)(1), the sentencing court imposed a sentence of 3½ to 20 years in prison upon defendant. Having received the benefits of MCLA 335.341(1)(a); MSA 18.1070(41)(1)(a), defendant cannot complain about the former 20-year mandatory sentence provision of MCLA 335.152; MSA 18.1122.

Affirmed.

R. B. Burns, P. J., concurred.

O'Hara, J. (*concurring in result*). I concur in the result reached by Judge Allen in the instant case.

I must, however, register my vigorous disagreement with the statement that "[a] proper jury instruction should include [an] admonition to disregard a reference

to a polygraph test because of its *unreliability*". (Emphasis supplied.)

Undoubtedly, such testimony or the results of a polygraph test are inadmissible under the well-established Michigan rule. But I do not construe this to mean that the involved instrument is without useful application in the criminal justice field.

My reason for writing separately is that at the prearrest or preindictment level both police and prosecutors sometimes utilize the device in determining whether or not to initiate criminal proceedings. In other instances suspects ask to take the test in support of their claims of innocence. I feel that this instruction is almost a complete judicial repudiation of the instrument for any purpose. I am not prepared to go that far. See *People* v *Davis*, 343 Mich 348, 371; 72 NW2d 269, 282 (1955), wherein the Michigan Supreme Court recognized the "proven value" of the polygraph with respect to the fields of criminal investigation and interrogation. That decision was made almost 20 years ago. During the intervening years both the use of and the reliability of the so-called lie detector have gained measurable stature.

For the reasons stated I would hold a criminal defendant has no entitlement to blanket instruction that the jury should disregard references to polygraph tests because of their unreliability.

APPENDIX B

May 21, 1974 unreported per curiam opinion of the Court of Appeals of Michigan, Division 3, in *People* v *Willie Wells*, Nos. 17071-17074.

STATE OF MICHIGAN

COURT OF APPEALS

DIVISION 3

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v. Docket No. 17071-2-3-4

WILLIE F. WELLS,
Defendant-Appellant.

BEFORE: Allen, P.J., J. H. Gillis and Quinn, JJ.

MEMORANDUM OPINION

Defendant appeals his jury-based conviction of receiving stolen property. MCLA 750.535; MSA 28.803.

An examination of the record discloses no reversible error.

Affirmed.

APPENDIX C

August 9, 1974 Order of the Supreme Court of Michigan in *People* v *Marvin Davis*, No. 56152, which is the subject of this petition for a writ of certiorari.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 9th day of August in the year of our Lord one thousand nine hundred and seventy-four.

Present the Honorable

Thomas M. Kavanagh,
Chief Justice,
Thomas G. Kavanagh,
John B. Swainson,
G. Mennen Williams,
Charles L. Levin,
Mary S. Coleman,
John W. Fitzgerald,
Associate Justices

On order of the Court, the request for counsel having been filed in propria persona by defendant-appellant, is considered and, pursuant to *Mitchell* v *Johnson*, 488 F2d 349 (CA 6, 1973), it is hereby ORDERED that the State Appellate Defender is appointed counsel for the preparation and filing with this Court of an application for leave to appeal on behalf of defendant-appellant. The Kent County Circuit Court will furnish such portions of the record as counsel may require.

The Prosecuting Attorney for Kent County may file objections to this order, within 14 days from the date of its certification, requesting remand to the Kent County Circuit Court for a determination of indigency.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 9th day of August in the year of our Lord one thousand nine hundred and seventy-four.

(s) Calvin R. Davis
Deputy Clerk

APPENDIX D

August 9, 1974 Order of the Supreme Court of Michigan in *People* v *Willie Wells*, No. 56153, which is the subject of this petition for a writ of certiorari.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 9th day of August in the year of our Lord one thousand nine hundred and seventy-four.

Present the Honorable

Thomas M. Kavanagh,
Chief Justice,
Thomas G. Kavanagh,
John B. Swainson,
G. Mennen Williams,
Charles L. Levin,
Mary S. Coleman,
John W. Fitzgerald,
Associate Justices

On order of the Court, the request for counsel having been filed in propria persona by defendant-appellant, is considered and, pursuant to *Mitchell* v *Johnson*, 488 F2d 349 (CA 6, 1973), it is hereby ORDERED that the State Appellate Defender is appointed counsel for the preparation and filing with this Court of an application for leave to appeal on behalf of defendant-appellant. The Kent County Circuit Court will furnish such portions of the record as counsel may require.

The Prosecuting Attorney for Kent County may file objections to this order, within 14 days from the date of its certification, requesting remand to the Kent County Circuit Court for a determination of indigency.

STATE OF MICHIGAN—ss

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 9th day of August in the year of our Lord one thousand nine hundred and seventy-four.

(s) Calvin R. Davis
Deputy Clerk

APPENDIX E

Text of Constitutional Provisions, Statutes and Court Rules Involved.

United States Constitutional Provisions

US Const, Am XIV 24

Michigan Constitutional Provisions

Mich Const 1963, Art 6, §1 26
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Michigan Statutory Provisions

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MCLA 600.215; MSA 27A.215 29
MCLA 600.308; MSA 27A.308 30
MCLA 600.309; MSA 27A.309 30

UNITED STATES CONSTITUTIONAL PROVISIONS

US Const, Am XIV:

AMENDMENT XIV. (1868)

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immu-

nities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the

United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

MICHIGAN CONSTITUTIONAL PROVISIONS

Mich Const 1963, Art 6, §1:

JUDICIAL POWER IN COURT OF JUSTICE; DIVISIONS. *Section 1.* The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

Mich Const 1963, Art 6, §4:

GENERAL SUPERINTENDING CONTROL OVER COURTS; WRITS; APPELLATE JURISDICTION. *Sec. 4.* The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge.

Mich Const 1963, Art 6, §5:

COURT RULES; DISTINCTIONS BETWEEN LAW AND EQUITY; MASTER IN CHANCERY. *Sec. 5.* The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinctions between law and equity proceedings shall, as far as practicable, be abolished. The office of master in chancery is prohibited.

Mich Const 1963, Art 6, §10:

> JURISDICTION, PRACTICE AND PROCEDURE OF COURT OF APPEALS. *Sec. 10.* The jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court.

MICHIGAN GENERAL COURT RULE PROVISIONS

GCR 1963, 801.1:

> RULE 801 REVIEW OF CASES BY COURT OF APPEALS.
>
> *.1* Method of Review. In all cases in which review by the Supreme Court or by the Court of Appeals is authorized by law, review shall be had by appeal to the Court of Appeals, subject to further appeal to the Supreme Court as provided by these rules. This rule refers only to the court and method of review and does not restrict, enlarge or change the right or scope of review provided by law, except as explicitly set out in these rules.

GCR 1963, 806.1:

> RULE 806 APPEALS BY RIGHT AND BY LEAVE.
>
> *.1* Appeal as of Right. In all criminal and civil matters, an aggrieved party shall have a right to appeal from all final judgments or final orders from the Circuit Courts, Court of Claims and Recorder's Court, except judgments on ordinance violations in the Traffic and Ordinance Division of Recorder's Court. Appeals from final judgments from all other courts and from convictions for ordinance violations in the Traffic and Ordinance Division of the Recorder's Court shall be taken to the Circuit Courts, upon which further review may be had only upon application for leave to appeal granted by the Court of Appeals. Final judgments or interlocutory orders of courts which by law are appealable to the Circuit Court only

upon leave or on appeal are to be tried de novo in the Circuit Court shall continue to be tried in the Circuit Court. See sub-rule 701.1. Appeals from final or interlocutory judgments of the District Court, Common Pleas Court, or judgments in ordinance cases in the Traffic and Ordinance Division of Recorder's Court shall be taken to the Circuit Court in which such court is located. Appeals as of right shall be taken in accordance with and within the time prescribed by these rules.

GCR 1963, 851:

RULE 851 MATTERS APPEALABLE TO SUPREME COURT.

.1 With respect to any final order of discipline or of dismissal by the State Bar Grievance Board on review, an appeal may be obtained by any aggrieved party upon compliance with, and in the form and manner provided in § 15.23 of the Procedural and Administrative Rules of the State Bar Grievance Board, supplementing the Rules of the State Bar of Michigan.

.2 With respect to any order of the Judicial Tenure Commission recommending the discipline, removal, retirement, or suspension of a respondent, an appeal may be obtained upon compliance with, and in the form and manner provided in subsection 24 of GCR 932.

.3 All other appeals to the Supreme Court, with the exception of those proceedings provided by GCR 797 and § 8 of Article III of the Constitution of 1963, may be taken only from appeals pending in the Court of Appeals or after decision by the Court of Appeals, as provided by the rules of this chapter.

GCR 1963, 853.1:

RULE 853 APPEALS FROM DECISIONS OF COURT OF APPEALS.

.1 Grounds. Appeals may be taken to the Supreme Court only upon application and leave granted, in the

discretion of the Supreme Court, from any decision of the Court of Appeals, interlocutory or final, upon a showing of a meritorious basis for appeal and any one of the following grounds.

(1) The subject matter of the appeal involves legal principles of major significance to the jurisprudence of the State.

(2) The decision of the Court of Appeals is clearly erroneous and will cause material injustice.

(3) The decision is in conflict with decisions of the Supreme Court or other Court of Appeals decisions.

(4) In any appeal of an interlocutory order of the Court of Appeals, it must be shown that appellant would suffer substantial harm by awaiting final judgment before taking appeal.

MICHIGAN STATUTORY PROVISIONS

MCLA 600.212; MSA 27A.212:

§ 27A.212 POWERS AND JURISDICTION OF COURT; SOURCE.]
Sec 212

The supreme court has all the powers and jurisdiction conferred upon it by the constitution and laws of this state. (CL '48, § 600.212.)

MCLA 600.215; MSA 27A.215:

§ 27A.215 MATTERS OVER WHICH COURT HAS JURISDICTION.]
Sec 215

The supreme court has jurisdiction and power over:

(1) any matter brought before it by any appropriate writ to any inferior court, magistrate, or other officer;

(2) any question of law brought before it in accordance with court rules, by certification or by any

trial judge of any cause pending or tried before him;

(3) any case brought before it for review in accordance with the court rules promulgated by the supreme court.

(CL '48, § 600.215.)

MCLA 600.308; MSA 27A.308:

§ 27A.308 JURISDICTION.] *Sec. 308.* The court of appeals has jurisdiction on appeals from:

(1) All final judgments from the ■ [circuit courts, court of claims, and] recorder's court, ■ [except judgments on ordinance violations in the traffic and ordinance division of recorder's court. Appeals from final judgments from all other courts and from convictions for ordinance violations in the traffic and ordinance division of recorder's court shall be taken to the circuit courts, upon which further review may be had only upon application for leave to appeal granted by the court of appeals].

(2) ■ [Such other judgments or interlocutory orders as the supreme court may by rule determine.]

■

(CL '48, § 600.308.)

MCLA 600.309; MSA 27A.309:

§ 27A.309 APPEALS BY RIGHT AND BY LEAVE.] *Sec. 309.* All appeals to the court of appeals from final judgments or decisions permitted by this act shall be a matter of right. All other appeals from other judgments or orders to the court of appeals permitted by statute or supreme court rule shall be by right or by leave as provided by the statute or the rules promulgated by the supreme court.

(CL '48, § 600.309.)